UPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1156

CHECKER MOTORS CORPORATION,

Petitioner,

v.

CHRYSLER CORPORATION and CHRYSLER MOTORS CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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At the outset, respondents argue that because the appeal below was from the denial of a preliminary injunction, this Court should not grant certiorari at this stage of the case.

However, respondents concede that the present challenge to Chrysler's rebate plan is grounded on petitioner's contention that the plan is, on its face, a *per se* violation

of Section 1 of the Sherman Act and they overlook the issue framed by the Court of Appeals itself, which was:

> "Is Chrysler's rebate plan a price fixing arrangement, and, thus, illegal per se under § 1 of the Sherman Act; if so, plaintiff may have been entitled to final judgment on the merits." (Appendix B, p. B4.)

The Court of Appeals thus was of the view that if the Chrysler plan were held to be a price fixing contract, combination or conspiracy, Checker could be entitled to final judgment on the merits. Hence, a review by this Court of the legal questions involved is entirely appropriate at this stage of the case.

Moreover, we again urge that the decisions in this case of the District Court and Court of Appeals, which permit a manufacturer, through the use of a rebate plan, to retain a considerable degree of control over the ultimate retail price paid by the customers of the manufacturer's dealers, have created a glaring loophole in the antitrust laws which requires prompt correction by this Court and that certiorari should therefore be granted.

As for respondents' attacks on Checker and its chief executive, Mr. Morris Markin, which are grounded in large measure on an article in the *New York Daily News,* these charges have been refuted in detail in the affidavits reproduced at 152a-197a and are in any event irrelevant to the legal question of whether the Chrysler rebate plan is a *per se* violation of Section 1 of the Sherman Act.

I

Respondents' brief deliberately ignores the decisions of this Court holding that a manufacturer may not affect the resale price of his product once it has left his control.

Not only does respondents' brief fail to come to grips with the numerous decisions of this Court proscribing all forms of price fixing, which are cited and discussed in the petition, but respondents completely ignore the line of cases, relied on by petitioner, which hold that once a "manufacturer parts with dominion over his product or transfers risk of loss to another, he may not reserve control of its destiny or the conditions of its resale" or seek to tamper with or control the product's resale price. *United States* v. *Arnold, Schwinn & Co.*, 338 U. S. 365, 379 (1967); *Simpson* v. *Union Oil Co.*, 377 U. S. 13 (1964); *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 721 (1944).

Respondents quote with approval (Resp. Br., p. 3) the finding of the District Court that:

> "Chrysler distributes its vehicles to the public via a nationwide system of independent franchised dealers . . . [who] upon purchasing automobiles from it, assumes the risk of loss and independently determines the retail price of automobiles purchased by it from Chrysler for sale." 23 F. Supp. at 879,

but fail to address themselves to petitioner's contention that once the dealer has negotiated a retail price with his customer, Chrysler re-injects itself into the pricing structure by granting the customer a $183 cash refund from whatever initial retail price has been negotiated, thereby clearly affecting the ultimate price paid by the retail customer.

Respondents urge that this Court's recent decision in *F.T.C.* v. *Fred Meyer,* 390 U. S. 341 (1968), stands for the proposition that cash rebates given by manufacturers to "retail customers" of their wholesalers are legal under the antitrust laws. The *Fred Meyer* case, which involved Section 2(d) of the Robinson-Patman Act, stands for no such principle. That case involved cash rebates given by manufacturers to *retailers.* In terms of the case at bar, it would involve a cash rebate given by Chrysler to its *dealers* (i.e., its retailers), leaving it up to the dealers to determine whether and how much of the rebate should be passed on to the consumers.

But this is precisely what Chrysler has not done. Nowhere in their brief do respondents deny our contention that Chrysler deliberately refrained from giving the rebate to the dealers because Chrysler did not want the dealers to have the discretion of keeping all or part of the rebate for themselves and of competing with each other with respect to the rebate's destiny. Indeed, respondents expressly admitted in their brief in the Court of Appeals that this was Chrysler's objective (see Petition, p. 11).

While the Robinson-Patman Act decision in the *Fred Meyer* case is irrelevant to the case at bar, we should note that Mr. Justice Harlan, in his dissenting opinion in *Fred Meyer,* addressed himself to a Sherman Act question which is relevant to our case, when he stated:

> ". . . The supplier could deal through his wholesalers, imposing restrictions on them to guarantee that an 'allowance' is actually passed through to retailers, only by running afoul of the Sherman Act." (390 U. S. at 361)

The principal issue in the case at bar is whether Chrysler's admitted device to guarantee that the cash rebate will be passed on to the consumers, instead of permitting the dealers to decide for themselves, in a competitive context, whether to pass on all or part of the price cut, is a violation of the Sherman Act.

II

The record shows the existence of a "contract, combination, or conspiracy".

Instead of addressing themselves to the recent decision of this Court in *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134 (1968), which holds that a parent corporation can conspire with its wholly-owned sales subsidiary in setting up a marketing plan, respondents completely ignore the case and maintain that Checker somehow "waived" this argument in the District Court. As we pointed out in deail in our reply brief in the Court of Appeals (pp. 14-16), Checker never waived or abandoned its contention that the Chrysler rebate plan is a contract, combination or conspiracy between Chrysler Corporation (the manufacturer) and Chrysler Motors Corporation (the sales organization). And even if there had been such a "waiver", this Court rejected a similar waiver argument by defendants in *Perma Life*, saying:

> "The gist of petitioners' cause of action has been clear from the outset, and respondents will in no way be prejudiced if petitioners are permitted to rely on these alternative theories of conspiracy." (392 U. S. at 142)

As for petitioner's alternative contention that there was also a contract, combination and conspiracy between respondents and their dealers who actively promote the rebate plan, respondents' rebuttal that their dealers are "acting solely out of simple individual self-interest" does not immunize a price fixing arrangement from the reach of Section 1 of the Sherman Act.

As this Court stated in *United States* v. *Arnold, Schwinn & Co.*, 338 U. S. 365, 375 (1967): "The promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct". And in *United States* v.

General Motors, 384 U. S. 127, 142 (1966), this Court held:

> "It is of no consequence, for purposes of determining whether there has been a combination or conspiracy under § 1 of the Sherman Act, that each party acted in its own lawful interest."

CONCLUSION

For the reasons stated in the petition and in this reply brief, petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,

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